

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAPHUS ELEY,	§	
	§	No. 137, 2000
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in
v.	§	and for Sussex County
	§	Cr.A.Nos. IS99-07-0027,
STATE OF DELAWARE,	§	0028, 0031-0033.
	§	
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 9906016291

Submitted: October 31, 2000

Decided: December 20, 2000

Before **VEASEY, Chief Justice, BERGER and STEELE**, Justices.

ORDER

This 20th day of December 2000, upon consideration of the appellant's brief filed pursuant to Supreme Court Rule 26(c) ("Rule 26(c)"), his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) On October 27, 1999, the appellant, Raphus Eley, was found guilty by a Superior Court jury of two counts of third degree burglary, one count of third degree assault, and two counts of misdemeanor theft. Eley was acquitted of two counts of second degree conspiracy. On December 10, 1999, the Superior Court sentenced Eley to three years at Level V,

suspended after his successful completion of the Level V Key Program and a Level IV Residential Substance Abuse Treatment Program, for Level III probation. Eley received suspended sentences and probation on the remaining counts.

(2) On January 28, 2000, Eley's trial counsel, E. Stephen Callaway, Esquire ("Callaway"), filed an untimely notice of appeal from Eley's October 27 conviction and December 10 sentencing.¹ By Order dated February 29, 2000, this Court, after concluding that Callaway provided ineffective assistance of counsel when he failed to perfect Eley's direct appeal, dismissed the untimely appeal and remanded the case to the Superior Court.² The Court directed the Superior Court to resentence Eley and to appoint new counsel to represent Eley in any new direct appeal that was filed with the Court.

(3) On March 21, 2000, the Superior Court appointed Timothy G. Willard, Esquire ("Counsel") to represent Eley at resentencing on March 24, 2000. On April 7, 2000, Counsel docketed an appeal on behalf of Eley.

¹ A timely notice of appeal should have been filed within 30 days of Eley's December 10 sentencing, *i.e.*, no later than January 10, 2000. 10 *Del. C.* § 147; Supr. Ct. R. 6(a)(ii).

(4) On appeal, Counsel has filed a brief and a motion to withdraw pursuant to Rule 26(c). Counsel asserts that, based upon a careful and complete examination of the record, there are no arguably appealable issues. Counsel states that he informed Eley of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief. Eley was also informed of his right to supplement Counsel's presentation with a written submission.

(5) According to Counsel, Eley contends that he submitted his written submission to Counsel "in care of" the Superior Court Prothonotary. Nonetheless, Counsel states that he did not receive Eley's submission. Counsel did, however, meet with Eley on October 12, 2000. At that time, Eley conveyed to Counsel two issues that he wanted brought to the Court's attention. Counsel has set forth Eley's issues in the Rule 26(c) brief. The State has responded to the position taken by Counsel, to the issues raised by Eley, and has moved to affirm the Superior Court's judgment.

(6) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under

² *Eley v. State*, Del. Supr., No. 42, 2000, Walsh, J., 2000 WL 275593 (Feb. 29, 2000)

Rule 26(c) is twofold: (a) the Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal; and (b) the Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.³

(7) In his first issue on appeal, Eley complains that he appeared at trial in prison attire. Eley contends that he requested before trial to appear at trial in civilian clothing.⁴

(8) There is no indication in the record that either Eley or Callaway objected to Eley's appearance at trial in prison attire. Absent plain error, this Court will not consider a claim that was not fairly presented in the trial court.⁵ Plain error is error that is so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.⁶

(ORDER).

³ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

⁴ The record reveals that Eley wore a white prison jumpsuit on the first day of trial. The record does not reveal what Eley wore on the second day of trial.

⁵ Supr. Ct. R. 8.

⁶ *Trump v. State*, Del. Supr., 753 A.2d 963, 971 (2000) (citing *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986)).

(9) We find no plain error stemming from Eley's appearance at trial in prison clothing. The United States Supreme Court has held that a State cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes.⁷ The record in this case, however, does not demonstrate that Eley was compelled by the State to go to trial in prison clothing. Moreover, since Eley was acquitted on two counts of second degree conspiracy, he cannot demonstrate that his appearance in prison attire so tainted the jury that the presumption of innocence was impaired.

(10) In his second issue on appeal, Eley contends that Callaway provided ineffective assistance of counsel at trial. Specifically, Eley claims that Callaway failed to subpoena two witnesses for trial.

(11) Delaware law is well settled that, on direct appeal, this Court will not consider claims of ineffective assistance of counsel that were not raised in the trial court.⁸ In its February 29 Order of remand, this Court determined that Callaway was ineffective when he failed to perfect Eley's direct appeal. The Superior Court, however, has not considered Eley's claim that Callaway was ineffective at trial. Accordingly, we decline to

⁷ *Estelle v. Williams*, 425 U.S. 501, 512 (1976). *Accord Watson v. State*, Del. Supr., No. 556, 1999, Holland, J., 2000 WL 975050 (May 24, 2000 (ORDER)); *Andrus v. State*, Del. Supr., No. 359, 1998, Holland, J., 1998 WL 736338 (Oct. 1, 1998) (en banc) (ORDER); *Payne v. State*, Del. Supr., 367 A.2d 1010, 1018 (1976).

review Eley's claim that Callaway was ineffective when he failed to subpoena two witnesses for trial. Furthermore, to the extent Eley is claiming that Callaway was ineffective when he allegedly failed to respond to Eley's request to appear at trial in civilian clothing or failed to object to Eley's appearance at trial in prison attire, Eley cannot raise this claim for the first time in this direct appeal.

(12) This Court has reviewed the record carefully and has concluded that Eley's appeal is wholly without merit and devoid of any arguably appealable issue. We are also satisfied that Counsel has made a conscientious effort to examine the record and has properly determined that Eley could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

Justice

cc: Clerk of the Court
c: Hon. Richard F. Stokes

⁸ *Duross v. State*, Del. Supr., 494 A.2d 1265 (1985).

Timothy G. Willard
Kim Ayvazian
Court's Distribution List